No. 15471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF AND ARGUMENT FOR APPELLANT.

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BRIEF FOR UNITED STATES OF AMERICA.

Jurisdictional Statement.

This is an appeal by the United States from an Order of the District Court for the Southern District of California, dismissing both Counts of the Indictment against defendant which Indictment was brought under the provisions of Section 78 of Title 21, United States Code. The violations charged were alleged to have been acts initiated in Los Angeles County, California, within the Central Division of the Southern District of California, and ending in Las Vegas, Nevada. The jurisdiction of the District Court was based upon Sections 3231 and 3237 of Title 18, United States Code. This Court has jurisdiction to entertain the instant appeal and to review the proceedings leading to the Order Dismissing the Indictment against defendant by reason of the provisions of Section 3731 of Title 18, United States Code.

Statement of the Case.

On July 25, 1956, the Federal Grand Jury at Los Angeles, California, returned a True Bill to a two count indictment against the defendant Safeway Stores, Inc., a corporation. (Hereinafter referred to as "Safeway.") The indictment charged a violation of Title 21, Section 78 of the United States Code, namely the transportation in interstate commerce of meat food products of cattle and swine which had not been inspected, examined and marked, "Inspected and Passed." The first count covered the transportation of forty-eight 2¼-ounce Kold Kist steaks; twelve 16-ounce Kold Kist sirloin tips; twelve 16-ounce packages of Kold Kist chili con carne; six 1-pound pack-packages of scrapple; twelve 9-ounce tamales; six 14-ounce packages of enchiladas; six 1¼-pound packages of tamales and six 15-ounce packages of beef tacos from Los Angeles to Las Vegas, Nevada.

The second count covered the transportation of 256 pounds of cured beef briskets; twelve 9-ounce tamales; twelve 8-ounce packages of chili; six 14-ounce packages of enchiladas; six 1¼-pound packages of tamales; six 15-ounce packages of beef tacos; 12 6-ounce packages of Taco Snax, and six 1-pound packages of enchiladas with refried beans.[1] [R. 3-5.]

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[1]The full text of the two counts in the indictment are as follows: Count One (U. S. C. Title 21, Sec. 78). On or about January 5, 1956, the exact date being to the grand jury unknown, defendant Safeway Stores, Inc., a corporation organized and existing under the laws of the State of Maryland and maintaining a warehouse at 1925 East Vernon Avenue, Los Angeles, California, did unlawfully transport from Los Angeles, California, within the Central Division of the Southern District of California, to the Safeway Store at 1300 East Charleston Boulevard, Las Vegas, Nevada, a quantity of meat food products of cattle and swine, to wit: forty-eight 2¼-ounce Kold Kist steaks, twelve 16-ounce Kold Kist sir-

On August 23, 1956, the defendant filed a motion to dismiss the indictment alleging that the defendant came within exceptions to the statute and that the indictment failed to inform the defendant of the nature and cause of the accusation.[2] [R. 5-6.] Memorandums in support of and in opposition to the motion were filed by the respective parties and the court heard argument on the motion on October 16, 1956. [R. 7-34.]

On the foregoing date a minute order was entered granting defendant's motion to dismiss. [R. 35.] This was followed on October 24, 1956, by a formal order

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loin tips, twelve 16-ounce packages of Kold Kist chili con carne, six 1-pound packages of scrapple, twelve 9-ounce tamales, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales, and six 15-ounce packages of beef tacos, which had not been inspected, examined, and marked "Inspected and passed" as required by law.

Count Two (U. S. C., Title 21, Sec. 78). On or about January 13, 1956, the exact date being to the grand jury unknown, defendant Safeway Stores, Inc., a corporation organized and existing under the laws of the State of Maryland and maintaining a warehouse at 1925 East Vernon Avenue, Los Angeles, California, did unlawfully transport from Los Angeles, California, within the Central Division of the Southern District of California, to the Safeway Store at 1300 East Charleston Boulevard, Las Vegas, Nevada, a quantity of meat food products of cattle and swine, to wit: 256 pounds of cured beef briskets, twelve 9-ounce tamales, twelve 8-ounce packages of chili, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales, six 15-ounce packages of beef tacos, twelve 6-ounce packages of Taco Snax, and six 1-pound packages of enchiladas with refried beans, which had not been inspected, examined, and marked "Inspected and passed" as required by law.

[2]As a third ground the defendant alleged that the indictment was not filed within a reasonable time after its return. [R. 6.] Defendant contended that inasmuch as the indicting Grand Jury was the February 1956 Grand Jury and that the indictment was not returned until July 25 that there was undue delay. After it was pointed out in plaintiff's memorandum opposing the motion that the Grand Jury was impaneled in February 1956 and that the indictment was actually returned on July 25, 1956 and filed on the same day [R. 23] this point was no longer urged by defendant.

granting defendant's motion and dismissing the indictment. [R. 36.] Notice of Appeal was filed on November 21, 1956. [R. 37.] Neither the minute order nor the formal order of October 24, 1956, set forth the reasons or basis for the court's decision and order.

Statutes Involved.

Sections 71 to 93, inclusive, of Title 21 of the United States Code are commonly referred to as the "Meat Inspection Act of 1907." The purpose of the act is to prevent traffic in diseased and unwholesome meats. *O'Connor v. Armour Packing Co.,* 158 Fed. 241, 15 L. R. A. (N. S.) 812 (5 Cir., 1908). Section 71 of Title 21 states in part:

> "For the purpose of preventing the use in interstate or foreign commerce of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made . . . an examination and inspection of all cattle, sheep, swine and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering or similar establishment . . ."

Section 72 of Title 21 provides for a post mortem examination of all carcasses *and parts thereof*

> "of all cattle, sheep, swine and goats to be prepared for human consumption at any slaghtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory or the District of Columbia *for transportation or sale* as articles of interstate or foreign commerce . . ." (Emphasis supplied.)

Carcasses and parts thereof found to be sound and wholesome and fit for human food are required to be marked, stamped, tagged or labeled as "Inspected and passed."

Section 75 of Title 21 requires that where any meat or meat food products that have previously been inspected and marked "Inspected and passed" are ". . . placed or packed in any can, pot, tin, canvas or other receptacle . . ." a label shall be attached to the container or covering under the supervision of the inspector stating that the contents have been "Inspected and passed."

The indictment in this case charges violations of Section 78 of Title 21. This section provides:

> "No person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia or to any place under the jurisdiction of the United States or to any foreign country, any carcasses or parts thereof, meat or meat food products thereof which have not been inspected, examined and marked as 'Inspected and passed' in accordance with the terms of sections 71 to 94, inclusive, of this title, and with the rules and regulations prescribed by the Secretary of Agriculture."

Section 88 of Title 21 sets forth the penalty that shall be imposed for a violation of Sections 71 to 94, inclusive, of the act.[3]

Certain exemptions provided in the act are applicable to "farmers," "retail butchers" and "retail dealers." Only those provisions applicable to "retail dealers" concern us in this case. A "retail dealer" is defined in Section 91 of Title 21, as follows:

> "A 'retail dealer' means any person, partnership, association, or corporation *chiefly engaged in selling* meat or *meat food products to consumers only* except that the Secretary of Agriculture, at his discretion, may permit any retail dealer to transport in interstate trade or foreign commerce to consumers and meat retailers in any one week not more than five carcasses of cattle; twenty-five carcasses of calves; twenty carcasses of sheep; twenty-five carcasses of lambs; ten carcesses of swine; twenty carcasses of goats, or twenty-five carcases of goat kids, or the equivalent of fresh meat therefrom, and to transport in interstate or foreign commerce to consumers *only* meat and *meat food products* which have been salted, cured, canned, or prepared as sausage, lard, or other meat food products which have not been inspected, examined, and marked as 'Inspected and passed' in accordance with the terms of sections 71-91 of this

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[3]The full text of Section 88 is as follows: "Any person, firm, or corporation, or any officer or agent of any such person, firm or corporation, who shall violate any of the provisions of sections 71 to 94, inclusive, of this title shall be deemed guilty of a misdemeanor and shall be punished on conviction thereof by a fine of not exceeding $10,000 or imprisonment for a period of not more than two years, or by both such fine and imprisonment, in the discretion of the court."

title, and Acts supplemental thereto, and with the rules and regulations prescribed by the Secretary of Agriculture." (Emphasis supplied.)

After defining a "farmer," "retail butcher" and "retail dealer," Section 91 states:

"The provisions of sections 71-91 of this title, requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products *supplying* their *customers* . . .

". . . And Provided Further, The Secretary of Agriculture is authorized to maintain the inspection in sections 71-91 of this title provided for any slaughtering, meat canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the Secretary of Agriculture shall establish such inspection *then* the *provisions* of said sections *shall apply* notwithstanding this exception."[4] (Emphasis supplied.)

The Regulations of the Secretary.

Section 89 of Title 21 authorizes the Secretary of Agriculture to adopt rules and regulations for carrying out the provisions of the Meat Inspection Act as follows: ". . . said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary

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[4]The full text of Section 91 deals largely with exemptions applicable to farmers and "retail butchers." We have quoted in full those parts of this section dealing with "retail dealers" in which exemption the defendant would fall, if any.

for the efficient execution of the provisions of said sections, . . ." The rules and regulations relating to meat inspection prescribed by the Secretary are found in the Code of Federal Regulations, Title 9,, Subchapter A, Parts 1 to 29, inclusive. Those sections dealing with inspections and exemptions, which are pertinent to this proceeding, are as follows:

> "§2.1. *Establishments requiring inspection.* Every estalishment in which cattle, sheep, swine, or goats are slaughtered for transportation or sale as articles in interstate or foreign commerce, or in which meat, meat byproducts, or meat food products of, or derived from, cattle, sheep, swine, or goats are, wholly or in part, canned, cooked, cured, smoked, salted, packed, rendered, or otherwise *prepared for transportation or sale* as articles of interstate or foreign commerce, which are capable of being used as food for man, *shall have inspection* under the regulations in this subchapter, *except as expressly exempted* by Part 4 of this subchapter." (Emphasis supplied.) (9 C. F. R. Sec. 2-1.)
>
> "§4.1. *Application for inspection or exemption.* (a) The proprietor or operator of each establishment of the kind specified in §2.1 of this subchapter shall make application to the chief of the division for inspection or for exemption from inspection." (9 C. F. R. Sec. 4.1.)
>
> "§4.3. *Exemption.* (a) Retail butchers and retail dealers in product, supplying their customers as provided in the Meat Inspection Act, upon making application, pursuant to §4.1, may be exempted from inspection. To each one so exempted a numbered certificate of exemption shall be furnished. No certificate of exemption shall be issued unless all of the

premises on which the products are prepared and handled are maintained in a sanitary condition . . ."

"§25.10. *Exemption; certificate for shipment of uninspected product.* When any product which has not been inspected and passed under the provisions of this subchapter is offered for transportation from one State or Territory or the District of Columbia to or through another State, or Territory or the District of Columbia or to any place under the jurisdiction of the United States, or to a foreign country, by any retail butcher or retail dealer who holds a certificate of exemption issued in compliance with the provisions of this subchapter, the carrier shall require and such retail butcher or retail dealer shall make and deliver to the carrier a certificate in duplicate in the following form."[5]

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[5] "Date....., 195

Name of carrier.....

Shipper .....

Point of Shipment.....

Consignee .....

Destination .....

Number of exemption certificate.....

I hereby certify that I am a retail butcher or a retail dealer in meat or meat products; that the following described meat or meat food products are offered for shipment in interstate or foreign commerce under a certificate of exemption issued to me by the United States Department of Agriculture, and that at this date they are sound, healthful, wholesome and fit for human food, and contain no preservative or coloring matter or other substance prohibited by the Federal meat inspection regulations.

Kind of product	Amount of weight
.....	.....

.....

Signature of Shipper

.....

Address of Shipper"

Assignments of Error.

Appellant sets forth the following assignments of error:

1. The indictment is sufficient to state an offense against the United States.

2. The Trial Court erred in dismissing the indictment.

Issues.

In the District Court defendant contended that the indictment did not state facts sufficient to constitute an offense because it affirmatively appeared on the face of the indictment that defendant comes within the exception to the statute exempting retail dealers in meat and meat products supplying its customers. It was also argued that the indictment did not sufficiently inform the defendant of the nature and cause of the accusation because it failed (1) to allege that the defendant did not come within the statutory exception and (2) because it did not specify whether defendant was being charged as a retail dealer or otherwise.

From the foregoing it appears that the issues on appeal are:

1. Is it essential that the allegations in the indictment negative the exemptions provided in Section 91 of the Meat Inspection Act?

2. Must the indictment allege that appellee is or is not a retail dealer in meat and meat products supplying its customers?

3. Does it affirmatively appear on the face of the indictment that appellee is exempt from the requirements of the statute?

ARGUMENT.

I.

It Is Not Necessary to Allege in the Indictment That Defendant Does Not Come Within the Exception to the Statute as Set Forth in Section 91 of Title 21 of the United States Code.

It has long been established that it is unnecessary to allege affirmatively in an indictment or criminal information that a defendant does not fall within the exemptions provided in a criminal statute. The rule was concisely phrased in *McKelvey v. United States,* 260 U. S. 353, 357 (1922), where the court stated:

> "By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere and that it is incumbent on one who relies on such an exception to set it up and establish it." (Cases cited.)

In so holding the Supreme Court sustained the decision of this Court in the *McKelvey* case. See also *Edwards v. United States,* 312 U. S. 473, 482 (1941); *Northern Pacific Railroad Co. v. Lewis,* 162 U. S. 366, 376 (1895); *Stokes v. United States,* 157 U. S. 187, 191 (1894); and *Evans v. United States,* 153 U. S. 584, 590 (1893).

In the case of *Taylor v. United States,* 142 F. 2d 808, 814 (C. A. 9, 1944), this Court again applied the established rule in a case involving the Emergency Price Control Act of 1942 when it said: ". . . it was not a burden of the Government to negative in the information exceptions which might exculpate the accused from liability under the Act."

The same identical issue was raised before the District Court for the District of New Jersey in the case of *United States v. Mendelsohn,* 32 Fed. Supp. 622, 624. In holding that it was unnecessary to negative the exemptions provided in 21 U. S. C. 91, the court said:

> "In the act before us each section except section 78 which defines the crime and section 91 which states the exemption has to do with the mechanics of inspection. The offense is completely defined in section 78, and the exception is nowise intertwined therein.
>
> * * * * * * * *
>
> "In the case before us the elements of the offense as defined in section 78 are fully set forth in the indictment. If the defendant comes within the subsequent exemption contained in section 91, his remedy is not by way of a motion to quash the indictment, but it is incumbent upon him to set up his defense and establish it."

Safeway has attempted in its pleadings before the District Court to distinguish the *Mendelsohn* case by asserting that it is uncertain from the opinion whether the facts alleged in the indictment there involved were similar to the indictment brought against defendant herein. The facts in that case were essentially the same as in the instant case. It involved an identical situation. The violation charged was the same as was the defendant's allegation that the exemption provided in Section 91 must be negatived in the indictment. The only difference is that in the *Mendelsohn* case it was admitted without reservation that the defendant was a retail dealer, which admis-

sion is not made with regard to Safeway.[6] The *Mendelsohn* case applied to the Meat Inspection Act the well-settled judicial principle that it is unnecessary in a criminal indictment to negative statutory exemptions and exceptions. Safeway's contention that this was necessary is totally without merit.

II.

It Is Unnecessary to Allege in the Indictment That Defendant Is or Is Not a Retail Dealer in Meat and Meat Products Supplying Its Customers.

Safeway contended in the District Court that the indictment did not sufficiently inform it of the nature and cause of the accusation in that it did not appear thereon whether Safeway Stores, Inc., was being charged as a retail dealer in meat and meat products supplying its customers, with the offense created by statute, or otherwise.

The lack of merit in such contention is immediately apparent upon examination of the statute envolved. Section 78 of Title 21 states that. "No *person, firm or corporation shall transport* or offer for transportation . . ." (emphasis supplied) meat or *meat food products which have not been inspected and marked as required* by the Meat Inspection Act and the regulations of the Secretary of Agirculture. In this respect the indictment is in the very language of the statute. Such form of pleading has long been approved by the courts. See *Reynolds v. United States,* 225 F. 2d 123, 126 (C. A. Fla., 1956), cert. den. 350 U. S. 914, reh. den. 350 U. S. 929; *Heas-*

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[6]At the time of the offense in the *Medelsohn* case Section 91 of Title 21 had not been amended. The difference in language between the original exemption provisions and those now in effect would in our view have no bearing on the decision of the court.

ley v. United States, 218 F. 2d 86, 88 (C. A. N. D., 1955), cert. den. 350 U. S. 882; *Brown v. United States,* 222 F. 2d 293, 296 (C. A. Cal., 1955); *Cohen v. United States,* 178 F. 2d 588, 591 (C. A. Ohio, 1949), cert. den. 339 U. S. 920.

Rule 7 of the Federal Rules of Criminal Procedure, paragraph (c) provides that, "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." It is submitted that the language of each count in the indictment in this case conforms to this rule. It informs Safeway of the charges against it so that it can adequately prepare its defense and is phrased with sufficient particularity so that Safeway is protected against other prosecutions for the same offense. See *Burnett v. United States,* 222 F. 2d 426, 428 (C. A. Ky., 1955); *Anderson v. United States,* 215 F. 2d 84, 86 (C. A. Ky., 1954), cert. den. 348 U. S. 888.

Safeway, before the District Court, cited many cases in support of the rule that it is essential that every ingredient of the crime must be charged in an indictment. The indictment in the instant case complies with this rule in every respect. The offense defined by Section 78 of Title 21 is the *transportation* in interstate commerce by *any* person, firm or corporation of meat or meat food products which have not been inspected and marked as inspected and passed. The indictment charges that on or about certain dates the defendant Safeway Stores, Inc., a corporation, *unlawuflly transported* from Los Angeles, California to one of its stores in Las Vegas, Nevada certain quantities of meat and meat food products, which had not been inspected and marked as required by law. There is nothing in Section 78 of the Meat Inspection

Act which indicates that to have violated Section 78 Safeway must have acted in any given capacity in transporting uninspected meat in interstate commerce. It should be remembered that the charge here is not failure to inspect, or failure to affix to the meat or meat food products the stamp "Inspected and Passed." The charge is the transportation of such unmarked meat and under the provisions of Section 78 any *person, firm or corporation* who does such an act is in violation of this section.

Much of Safeway's argument in support of this contention is merely a restatement of the proposition that it is necessary to negative every statutory exception in an indictment charging a violation of statute. Safeway would require that the indictment set forth that it was or was not operating as a retail dealer subject to the exceptions of Section 91. These contentions have heretofore been answered and are clearly not supported by the decisions of this and other courts. The indictment conforms to Rule 7 of the Federal Rules of Criminal Procedure as that rule has been interpreted by the courts.

III.

It Does Not Appear From the Face of the Indictment That Safeway Is Exempt From the Requirements of the Statute.

1. Nothing Contained in the Indictment Brings Safeway Within the Exemption Provisions of Section 91.

It appears that Safeway's position in the District Court on this issue was that the court could judicially notice that Safeway is a large retail chain grocery concern and that as such it automatically fell within the exemption provisions of Section 91. There is nothing in the indictment, other than the name "Safeway Stores, Inc.," that could lead to such a conclusion.

Section 91 of Title 21 establishes exemptions from certain requirements of the Meat Inspection Act with respect to three classes of persons. First, it exempts a "farmer" from compliance with certain provisions of the Act, and defines the term "farmer." Obviously Safeway does not fall within this category of persons exempt from certain provisions of the Act. Second, it exempts a "retail butcher" from compliance with certain provisions of the Act, and defines the term "retail butcher." While it might be argued that Safeway could fall within this exemption as the term is defined in the Act, no such contention was made by Safeway. Rather, Safeway contended that it fell within the third category of persons for which certain exemptions are provided, that of a "retail dealer."

A "retail dealer" is defined in subsection (c) of Section 91 as ". . . any person, partnership, association or corporation *chiefly* engaged in selling meat or meat food products *to consumers only* . . ." (Emphasis supplied.) Of course, there are no facts of record in this proceeding. If the court, however, may judicially notice that Safeway is a large retail chain grocery concern, it may also judicially notice that Safeway's business is not that of ". . . *chiefly* . . . selling meat or meat food products *to consumers only* . . ." (Emphasis supplied.) While it must be admitted that Safeway's meat department is an important branch of its business, it cannot be said that its meat business is its *chief* business anymore than it could be said that its produce business is its chief busines, or its bakery business, or its grocery business. This makes it obvious, that *on its face* the indictment does not establish that Safeway is exempt as a "retail dealer" under Section 91. If by any chance Safeway is *chiefly* engaged in selling meat or meat food products to its cus-

tomers, that fact can only be established from evidence offered by way of defense at time of trial. It cannot be established from anything shown on the face of the indictment.

Moreover, there are other reasons why on its face the indictment does not establish Safeway's exemption under Section 91. In the definition of a "retail dealer" provision is made for the transportation of limited quantities of meat and meat food products which have not been inspected and passed and so marked. These quantity limitations are the carcasses of: 5 cattle, 25 calves, 20 sheep, 25 lambs, 10 swine, 20 goats, and 25 goat kids *each week,* or the equivalent in fresh meat therefrom. It is well known that Safeway's operations are extensive and that their volume of meat business is substantial. It is inconceivable that Safeway would transport from its warehouse in Los Angeles to its retail stores in Las Vegas, Nevada, only 5 carcasses of cattle a week. Again it becomes apparent that *on its face* the indictment does not establish that Safeway is exempt from the provisions of the Act. At a trial, evidence may possibly show that despite Safeway's extensive business and its several retail stores in Las Vegas, Nevada, that it did not transport more than 5 carcasses of cattle from Los Angeles, California to Las Vegas, Nevada, during the weeks of January 5 and January 13, 1956. If it otherwise qualified under the exemptions of Section 91, this fact may relieve it of compliance with the Act. *But this fact is not now known* and does not in any way show on the face of the indictment. The logical inference because of the size of the operation is that the exact contrary is true. The exemption is not established by any statement contained in the indictment.

2. The Exemption Provisions of Section 91 Were Never Intended to Apply to the Type of Business Conducted by Safeway.

Manifestly this exemption was never intended to apply to an operation such as is carried on by Safeway. In the debates on the bill which became the Meat Inspection Act, it was stated by members of Congress that the exemption would apply only to the small dealer located near a State line. In explanation of the exemption provisions (Sec. 91) Congressman Wadsworth stated:

> "That clause [the exemption in section 91] was put in to exempt the farmer and retail butcher . . . the small dealer who might be located near the state line and who, in the course of his business, peddling from a wagon or cart, passes over a state line." (Vol. 40 Cong. Rec. Part 9, p. 8722.)

The Act has always been interpreted by those charged with its administration in conformity with this explanation.

In 1938 the Act was amended by Public Law 776, 75th Congress, 3rd Session, and Section 91 was made to read as it now does. While the legislative history pertaining to the enactment of these amendments does not throw much light on the interpretation of Section 91, House Report 2310 and Senate Report 2182, which accompanied Public Law 776 seem to confirm the accuracy of the interpretation placed on the exemption provisions. These reports indicate that it was the intent of Congress to restrict the application of the exemption by the language of the amendments.

For the purposes of the Motion to Dismiss filed by Safeway, the facts alleged in the indictment are presumed to be true. *United States v. Universal Bottle*

Service, 85 Fed. Supp. 622, 625 (D. C. Ohio, 1949). Accordingly, the facts before the court at this time are that Safeway transported from its warehouse at Los Angeles, California, to one of its stores at Las Vegas, Nevada, certain specified quantities of meat and meat products that had not been inspected and marked as "Inspected and Passed." These facts show that the operation carried on by Safeway was not in the nature of a retail operation where it was transporting meat in interstate commerce directly to its customers, but it was rather that of a *wholesale* dealer or distributor transporting meat to its various retail outlets, an operation not intended to be covered by the exemption provisions of the Act.

3. Exemption Covering the Transportation of Uninspected Meat in Interstate Commerce Is Not Automatic. The Granting of Such an Exemption Is Discretionary With the Secretary of Agriculture and Must Be Requested by the Retail Dealer.

In reading subsection (c) of Section 91 it might first appear that there are two separate provisions granting the same exemption to retail dealers. In the first paragraph of (c) a "retail dealer" is defined. It then states, ". . . except that the Secretary of Agriculture, *at his discretion may permit* any retail dealer *to transport* in interstate trade or foreign commerce to consumers and meat retailers in any one week not more than five carcasses of cattle . . ." (Emphasis supplied.) This exemption relates to the *transportation* of uninspected meat and meat products, the violation charged in the indictment in this case.

The second paragraph of subsection (c) states that "The provisions of Sections 71-91 of this title, *requiring*

inspection to be made by the Secretary of Agriculture shall not apply . . . to retail dealers in meat and meat food products, *supplying their customers* . . ." (Emphasis supplied.) This exemption applies only to those sections between 71 and 91 which *require inspection* to be made by the Secretary of Agriculture, and only to those retail dealers who are supplying their customers. Section 78, the violation of which is charged in the indictment, in no way requires the Secretary of Agriculture to make an inspection.[7] This section merely prohibits the transportation of uninspected meat. The second paragraph of subsection (c) does not, therefore provide any exemption to Safeway in connection with the transportation of uninspected meat in interstate commerce as charged in the indictment. If any exemption provisions does apply (which is strongly denied) it is that provided in the first paragraph of subsection (c) of Section 91 relating to the transportation of uninspected meat.

As has heretofore been indicated, this exemption relating to the transportation of uninspected meat is completely discretionary with the Secretary of Agriculture. Permission must be requested to transport uninspected meat under this exemption, and the Secretary of Agriculture must take some action on this request in view of the specific language of the statute which grants the exemption by stating that the Secretary "at his discretion may permit" the transportation of uninspected meat. As we have previously pointed out there are no facts upon which this Court can make a determination as to whether Safeway has or has not filed with the Secretary an appli-

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[7]Sections 71, 72, 73, 74, 76, 77, 80, 83 and 89 require in one manner or another inspection by the Secretary of Agriculture.

cation for an exemption.[8] This emphasizes the fallacy of Safeway's contention that *on its face* the indictment establishes that it is exempt from the provisions of the Act. If Safeway was entitled to an exemption under the first paragraph of subsection (c) of Section 91 (which is denied by the appellant), there is nothing of record to show whether an application was filed by Safeway, whether the Secretary of Agriculture took action on the application, and if so, whether the application was acted on favorably or unfavorably. It would be rather unusual for this indictment to have been brought if favorable action had been taken by the Secretary on a request from Safeway for permission to transport uninspected meat. Yet, these facts are not of record and can be brought out only as matters of defense at a trial. On its face there is nothing to indicate that a request was filed by Safeway or that the request was or was not granted.

4. The Exemption Provisions of Section 91 Are Not Applicable to the Facts Alleged in the Indictment.

The facts in the indictment are admitted to be true for the purpose of the Motion to Dismiss filed by Safeway. *Las Vegas Merchant Plumbers Association v. United States,* 210 F. 2d 732, 741 (C. A. Nev., 1954), cert. den. 348 U. S. 817, reh. den. 348 U. S. 889; *United States v. Lattimore,* 215 F. 2d 847, 851 (C. A. D. C., 1954); *United States v. J. R. Watkins Co.,* 16 F. D. R. 229, 232 (D. C. Minn., 1954).

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[8]The United States Department of Agriculture reports that it has no record of any request having been made by Safeway for the transportation of uninspected meat between Los Angeles and Las Vegas during January 1956, or at any other time.

In Count One of the indictment Safeway is charged with transporting from its warehouse in Los Angeles, California, to one of its stores in Las Vegas, Nevada, among other things, "twelve 16-ounce packages of Kold Kist chili con carne, six 1-pound packages of scrapple, twelve 9-ounce tamales, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales and six 15-ounce packages of beef tacos," which had not been inspected and marked as inspected and passed.

In Count Two of the indictment Safeway is charged with transporting from its warehouse in Los Angeles, California to one of its stores in Las Vegas, Nevada, "256 pounds of cured beef briskets, twelve 9-ounce tamales, twelve 8-ounce packages of chili, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales, six 15-ounce packages of beef tacos, twelve 6-ounce packages of Taco Snax, and six 1-pound packages of enchiladas with refried beans," which had not been inspected and marked as inspected and passed.

All of the above articles alleged to have been transported by Safeway from Los Angeles, California to Las Vegas, Nevada, without being inspected are *meat food products* as distinguished from animal carcasses or "fresh meat therefrom." The exemption provisions of Section 91 make a clear differentiation as to exemption to be granted for the transportation of animal carcasses or fresh meat therefrom and for meat food products. While provisions is made for granting permission to transport uninspected carcasses of certain animals in limited quantities "or the equivalent of fresh meat therefrom" "to consumers *and meat retailers*" the statute restricts the transporting of uninspected *meat food products* "to *consumers only.*" (Emphasis supplied.) Again accepting as true the allegations in the indictment for the

purposes of Safeway's Motion to Dismiss, there is nothing contained in the indictment to show that any of the articles transported by Safeway from Los Angeles, California to Las Vegas, Nevada, were delivered to "consumers." The allegations are that they were delivered to one of Safeway's stores located at 1300 East Charleston Boulevard, Las Vegas, Nevada. By no stretch of language can this be construed to fall within the meaning of the statutory exemption, which states, ". . . and to transport in interstate or foreign commerce *to consumers only* meat and meat food products . . . which have not been inspected, examined, and marked as 'Inspected and Passed' in accordance with the terms of Sections 71-91 of this title, and the Acts supplemental thereto, and with the rules and regulations prescribed by the Secretary of Agriculture." (Emphasis supplied.)

This plain statutory language contains no exception, and it has been held that the courts "are not at liberty to construe language so plain as to need no construction. . . ." *Helvering v. City Banks Co.,* 296 U. S. 85, 89. See also *United States v. Raynor,* 302 U. S. 540, 552; *Osaka Shosen Line v. United States,* 300 U. S. 98, 101; *Hamilton v. Rathbone,* 175 U. S. 414, 421; *Lake County v. Rollins,* 130 U. S. 662, 670.

That delivery to a retail store is not the same as delivery to consumers is clearly shown by the fact that as to carcasses and fresh meat the exemption permits delivery to consumers and *meat retailers,* while as to meat food products it permits delivery to "consumers only." If Congress had intended delivery to a retail store to be the same as delivery to consumers there would have been no need to state the two different exemptions and specify "and meat retailers" in the exemption applying to car-

casses and fresh meat. Different exemptions were intended and provided for by Congress. Any other construction would "violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Ginsberg & Sons v. Popkin,* 285 U. S. 204, 208. See also *McDonald v. Thompson,* 305 U. S. 263, 266; *Market Co. v. Hoffman,* 101 U. S. 112, 115-116.

The indictment, rather than establishing on its face that Safeway is exempt from the provisions of the Meat Inspection Act, clearly establishes that the exemption does not apply in any way to the facts which have been alleged and which must be assumed as true for the purposes of the motion to dismiss.

The purpose of the Meat Inspection Act, briefly stated, is to protect the consuming public from the dangers of impure and unwholesome meat and *meat food products.* If an interpretation were placed on the exemption provisions of the act that would have the effect of exempting the large chain food stores from compliance with the Act, its very purposes would be defeated. It is a well-established principle that a regulatory statute should be interpreted so that its effectiveness will not be impaired, and an interpretation should be adopted which "will preserve the vitality of the Act and the utility of the language . . ." *Sunshine Coal Co. v. Adkins,* 310 U. S. 381, 392. A statute should be construed, if possible, "in a manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro v. United States,* 335 U. S. 1, 31. See also *National Labor Relations Board v. Greensboro Coca-Cola B. Co.,* 180 F. 2d 840, 845 (C. A. 4); *McDonald v. Thompson,* 305 U. S. 263, 266; *Piedmont & Northern Ry. v. Comm'n,* 286 U. S. 299, 311-312.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court granting Appellee's Motion to Dismiss should be reversed, and that defendant Safeway Stores, Inc., should be required to plead to the charges in the indictment.

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